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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 465

CLEVELAND KIRKLAND, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

On Appeal from the Court of Criminal Appeals of the State of Texas

JURISDICTIONAL STATEMENT WITH ALTERNATIVE PETITION FOR WRIT OF CERTIORARI

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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Court of Criminal Appeals of Texas rendered on February 6, 1963, the order overruling Appellant's Motion for Rehearing on March 27, 1963, and the overruling of Appellant's Second Motion for Rehearing on April 24, 1963, and submits this Statement to show that this Honorable Court has jurisdiction of the appeal and that a substantial fed-

eral question is presented. Appellant filed his notice of appeal with the Court of Criminal Appeals of Texas on the 22nd day of July, 1963, and on the same date notified the Attorney General of Texas of the appeal.

OPINIONS BELOW

The opinions of the Court of Criminal Appeals of Texas are as yet unreported, but copies of the said opinions are attached hereto as Appendix A.

JURISDICTION

This is a suit brought to enjoin the enforcement of Article 725b, and particularly §§ 1(14), (15), 2(a) and 2(A), Vernon's Annotated Penal Code of Texas, Acts 1955, 54th Leg., p. 1027, ch. 386, § 1, which Appellant contends are unconstitutional.

The Appellant in this appeal seeks review of the judgment of the Court of Criminal Appeals of the State of Texas rendered on February 6, 1963, the overruling of the Motion for Rehearing on March 27, 1963, and the denial of the Second Motion for Rehearing on April 24, 1963. Upon denial of relief in the Court of Criminal Appeals of Texas on April 24, 1963, the Court of Criminal Appeals of Texas issued an order delaying the issuance of mandate for thirty (30) days to allow appellant to appeal to this Honorable Court for relief. Associate Justice Black on the 20th day of May, 1963, entered an order staying execution of mandate pending timely filing and disposition of this appeal.

The jurisdiction of this Honorable Court to hear this appeal rests upon 28 U.S.C. §1257(2).

The following cases are believed to sustain this Honorable Court's jurisdiction herein:

Knapp v. Schweitzer, 357 U.S. 371, 2 L. Ed. 2d 1393, 78 S. Ct. 1302;
Giacomo Reina v. United States, 364 U.S. 507, 5 L.Ed. 2d 249, 81 S.Ct. 260.

QUESTION PRESENTED

Is a state penal statute which uses as its standard for a "narcotic drug", ". . . restricted preparations under the provisions of the Federal Narcotic Law" (Article 725b, Vernon's Annotated Penal Code of Texas), invalid as repugnant to a federal treaty which committed the United States to a course of action in a solemn compact with other nations in controlling the use of narcotic drugs to such a degree as to preclude any law by a state not in complete accord with said treaty and compact as void, and under which a statute of the United States, to-wit: 26 U.S.C.A. §4702 and the regulations implementing said statute, to-wit: 26 C.F.R. 151.428 were enacted and promulgated, which statute and regulations specifically exempt from control medicinal solutions containing less than .2500 grains of morphine per fluid ounce, where the state statute aforesaid has been construed by the highest criminal appellate court of the State as prohibiting the sale of twenty (20) ounces of paregoric, a medicinal solution containing not more than .17798 grains of morphine per fluid ounce?

TREATY, CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, concluded at Geneva, July 13, 1931, and entered into force with

respect to the United States of America, July 9, 1933, as amended by the protocol signed at Lake Success on December 11, 1946, and protocol bringing under international control drugs outside the scope of the convention of July 13, 1931, for limiting the manufacture and regulating the distribution of narcotic drugs (as amended by the protocol signed at Lake Success on December 11, 1946), signed at Paris, November 19, 1948, and entered into force with respect to the United States of America, September 11, 1950

Title 26, U.S.C.A. §4701

"(a) *Rate.*—There shall be imposed an internal revenue tax upon narcotic drugs, produced in or imported into the United States, and sold, or removed for consumption or sale at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be taxed as an ounce. The tax imposed by this subsection shall be in addition to any import duty imposed on narcotic drugs.

"(b) *By whom paid.*—The tax imposed by subsection (a) shall be paid by the importer, manufacturer, producer, or compounder. Aug. 16, 1954, 9:45 a.m., E.D.T. ., c. 736, 68A Stat. 549."

Title 26, U.S.C.A. §4702

(a) Exceptions from certain provisions authorized for preparations of no addictive quality or of minor addictive quality.—

(1) If the Secretary or his delegate, either upon his own motion or upon the application of an interested party, after consideration of the report and recommendations of an advisory committee appointed under paragraph (4) of this subsection, and after due notice and opportunity for hearing, finds that a pharmaceu-

tical preparation containing a narcotic drug combined with other active or inactive ingredients—

(A) either possesses no addiction-forming or addiction-sustaining liability, or does not possess an addiction-forming or addiction-sustaining liability sufficient to warrant imposition of all of the requirements of this part, and

(B) does not permit the recovery of a narcotic drug having such an addiction-forming or addiction-sustaining liability, with such relative technical simplicity and degree of yield as to create a risk of improper use;

the Secretary or his delegate may except such pharmaceutical preparation to the extent consistent with the obligations undertaken by the United States pursuant to the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, concluded at Geneva, July 13, 1931, and entered into force with respect to the United States of America, July 9, 1933, as amended by the protocol signed at Lake Success on December 11, 1946, and the protocol bringing under international control drugs outside the scope of the convention of July 13, 1931, for limiting the manufacture and regulating the distribution of narcotic drugs (as amended by the protocol signed at Lake Success on December 11, 1946), signed at Paris, November 19, 1948, and entered into force with respect to the United States of America, September 11, 1950, and with the public health, safety and welfare, from any or all of the requirements imposed by this part, other than those requirements imposed by sections 4721, 4722, 4724(a), and 4732, and from any or all of the requirements imposed by section 6 of the Act entitled "An Act to prohibit the importation and use of opium for other than medicinal purposes", approved February 9, 1909, as amended by section 15 of the Narcotics Manufacturing Act of 1960.

(2) In excepting any pharmaceutical preparation under paragraph (1), the Secretary or his delegate may, in his discretion, apply any or all of the following requirements:

(A) Such pharmaceutical preparation shall be manufactured, sold, distributed, given away, dispensed, or possessed as a medicine and not for the purpose of evading the intentions and provisions of this subpart and subpart C;

(B) Any manufacturer, producer, compounder, or vendor (including dispensing physicians) of such pharmaceutical preparation, lawfully entitled to manufacture, produce, compound, or vend such pharmaceutical preparation, shall keep such records relating to such pharmaceutical preparations as the Secretary or his delegate shall deem necessary;

(C) Every person so possessing or disposing of such pharmaceutical preparation shall register as required in section 4722 and, if he is not paying a tax under section 4721, shall pay a special tax of $1 for each year, or fractional part thereof, in which he is engaged in such occupation, to the official in charge of the collection district in which he carries on such occupation as provided in subpart C.

(3) If the Secretary or his delegate shall subsequently determine after due notice and opportunity for hearing, that a pharmaceutical preparation to which such exceptions have been made applicable possesses a degree of addiction liability, or permits recovery of a narcotic drug having a degree of addiction liability, that results in abusive use of such exceptions, he is authorized to withdraw and revoke such exceptions in whole or in part.

(4) Whenever the secretary or his delegate shall, on his own motion, determine that there may exist reasonable evidence to support a finding in accordance with paragraph (1) of this subsection, or whenever an interested party makes an application for such a finding, the Secretary or his delegate shall thereupon appoint an advisory committee of experts. At least one member of such an advisory committee shall be selected by the Secretary or his delegate, and by the interested party making the application, if any, one by the Surgeon General of the (United States) Public Health Service, and one by the Commissioner of the (United States) Food and Drug Administration. The Secretary or his delegate shall submit to such advisory committee the application of the interest party, if any, and any other available data. As soon as practicable, thereafter, the advisory committee shall, after independent study of the material submitted to it by the Secretary or his delegate and other data available to it, certify a report and recommendation to the Secretary or his delegate with respect to the pharmaceutical preparation involved.

(5) After consideration of the report and recommendation of the advisory committee, and after due notice and opportunity for hearing, the Secretary or his delegate shall either make the finding provided for in paragraph (1) of this subsection and grant such exceptions as he deems appropriate, or determine that the evidence does not support such a finding and deny the application, if any. As amended Apr. 22, 1960, Pub.L. 86-429, §4(c), 74 Stat. 58."

26 C.F.R. 151.428 *Exempt Narcotic Pharmaceutical Preparations.*

". . . (2) Pharmaceutical preparations containing not more than 16.2mgs. (¼ gr.) morphine, or any of its salts, per 29.5729 cc (1 fl. oz.) or per 28.36 ms. (1 av. oz.): . . ."

Article VI. Clause 2, Constitution of the United States

"This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

AMENDMENT FOURTEEN, CONSTITUTION OF THE UNITED STATES

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

Article 725b. §§ 1(14) (15); 2a; 7A, Vernon's Annotated Penal Code

". . . (14) 'Narcotic drugs' means coca leaves, opium, and cannabis, amidone, and isonipecaine, every substance neither chemically nor physically distinguishable from them, and opiates which shall mean any drug found to be an addiction-forming or addiction-sustaining liability similar to opium or cocaine, which are now or may be added subsequently, as restricted preparations under the provisions of the Federal Narcotic Laws.

"(15) 'Federal Narcotic Laws' means the laws of the United States relating to opium, coca leaves, and other narcotic drugs."

"Sec. 2(a). It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug."

"Sec. 2A. It shall not be unlawful to manufacture, possess, have, control, sell, prescribe, administer, dispense, or compound any narcotic drug or any hypodermic syringe, needle, or other instrument adapted to the use of narcotic drugs where same is authorized under the terms of this Act. As amended Acts. 1955, 54th Leg., p. 1027, ch. 386, §1."

Article 758. Vernon's Annotated Penal Code

"Whoever, not being licensed as a pharmacist, shall conduct or manage any drug store or other place of business for the compounding, dispensing or sale at retail of any drugs, medicine or poisons, or for the compounding of physicians' prescriptions contrary to any provision of the three preceding articles shall be fined not less than twenty-five nor more than one hundred dollars. Each week such drug store or pharmacy or other place of business is so unlawfully conducted shall be a separate offense. Whoever not being licensed as a pharmacist or assistant pharmacist shall compound, dispense or sell at retail any drugs, medicine, poison or pharmaceutical preparation even upon a physician's prescription or otherwise, and whoever being the owner or manager of the drug store, pharmacy or other place of business, shall cause or permit any one not licensed as a pharmacist or assistant pharmacist to dispense, sell at retail or compound any drug, medicine, poison or physician's prescription, contrary to any provision of the three preceding articles, shall be fined not less than ten nor more than one hundred dollars. Any license or permit or renewal thereof, obtained through fraud, or by any false or fraudulent representations, shall be void and of no effect in law. Any person who shall make any

false or fraudulent representations for the purpose of procuring a license or renewal thereof, either for himself or for another, shall be fined not less than twenty-five nor more than one hundred dollars. Whoever being the holder of any license or permit granted under this law, shall fail to expose such license or permit, or any renewal thereof, in a conspicuous position in the place of business to which such license or permit relates, or in which the holder thereof is employed, contrary to the provisions of article 757 shall be fined not less than five, nor more than twenty-five dollars, and each week that such license permit or renewal shall not be exposed, shall be a separate offense, and whoever being the holder of any license or permit granted under this law shall, after the expiration of such license or permit, and without renewing the same, continue to carry on the business for which such license or permit was granted, contrary to the provisions of article 757 shall be fined not less than five nor more than twenty-five dollars. Acts 1907, p. 349."

STATEMENT OF THE CASE

I. Procedural History of the Case

The Appellant was charged by indictment with unlawfully selling a narcotic drug, to-wit: a preparation of opium commonly called paregoric. (R. p. 4) He was brought to trial in Criminal District Court Number Two of Harris County, Texas on the 17th day of May, 1962, where he pled not guilty. He was subsequently found guilty and his punishment assessed at five years in the state penitentiary. (R. p. 20) The Appellant appealed said conviction to the Court of Criminal Appeals of Texas, and that court affirmed the conviction on February 6, 1963. (Appendix A)

This affirmance was followed by a Motion for Rehearing which was overruled on March 27, 1963. (Appendix A) The overruling of this Motion was followed by a Second Motion for Rehearing which was overruled on April 24, 1963. (Appendix A)

II. Facts Material to the Question Presented

The offense alleged in the indictment was the unlawful sale of paregoric.

The only evidence which the State introduced against Appellant was with the regard to a sale by the Appellant, the owner of a drug store, of five (5), four (4) ounce bottles of paregoric, a medicinal preparation, to Officer Don Pollock of the Houston Police Department and the testimony of Robert F. Crawford, a chemist in the Houston Police Department as to the chemical make-up of the paregoric.

Officer Pollock stated that on the evening of November 20, 1961, he, acting as an undercover agent for the Houston Police Department, bought five (5), four (4) ounce bottles of paregoric from Appellant at Appellant's drugstore. (R. pp. 39-58)

Chemist Crawford testified that upon his examination of the bottles and contents in question, they were found to be paregoric, with no one bottle containing more than thirty-nine (39) milligrams of morphine per one hundred (100) c.c.'s of liquid. (R. pp. 67 and 68) This equivalent to .177988237 grains per fluid ounce.

Other testimony on behalf of the State was in rebuttal to an alibi defense of the Appellant.

III. Federal Questions Raised In The Trial Court Below and In The Court of Criminal Appeals of The State of Texas

(A) In The Trial Court

Appellant urged in his Motion to Quash the Indictment which was presented according to law to the trial court before the trial of this case:

> "The Defendant objects and excepts to the indictment in this cause for the reason that the indictment does not allege wherein the defendant did unlawfully sell a narcotic drug, to-wit: paregoric, as the same is an exempt narcotic and there is insufficient allegation of wherein the sale was unlawful to apprise this Defendant of the proof he will be required to meet in this case." (Paragraph X) (R. p. 7)

and further:

> "The Defendant excepts and objects and moves the Court to dismiss the indictment for the reason that the indictment as drawn does not apprise this Defendant of the offense with which he is alleged to have committed with sufficient particularity to afford this Defendant the benefit of the right to be represented by counsel and the general allegations of this indictment deprives this Defendant of effective assistance of counsel as guaranteed by the Sixth Amendment of the Constitution of the United States, the Fourteenth Amendment of the Constitution of the United States, to-wit: the 'Equal Protection of the Law' and "Due Process of Law" and Art. 1 §10 of the Constitution of the State of Texas also is directly contrary to the cases now construing effective assistance of counsel, as guaranteed by the laws and Constitution of the State of Texas and the laws and Constitution of the United States as aforesaid. (Paragraph XII) (R. p. 8)

"The Defendant objects and excepts and moves the Court to dismiss the indictment in this cause for the reason that it is impossible to determine whether or not the Defendant is charged with operating a pharmacy without a license pursuant to Art. 4542 A, §8, Vernon's Civil Statutes of the State of Texas and Art. 757, 758, 758(a), V.A.P.C. or Art. 725(b), V.A.P.C. (Paragraph XIII) (R.p. 8)

"The Defendant objects and excepts to the form and substance of the indictment and moves the Court to dismiss the indictment for the reason that the Defendant is not apprized of the offense alleged nor the punishment therefor due to the fact that if Art. 725 (b), V.A.P.C. does in fact prohibit the acts alleged in the indictment, then the punishment to be fixed is uncertain in that Art. 728(a) (sic 758) of V.A.P.C., which said statute provides for a penalty of a fine from Fifty ($50.00) Dollars to Five Hunderd ($500.00) Dollars or by confinement in jail for not less than one nor more than six months; therefore, the statutes of the State of Texas are void for the reason that they provide two different punishments for a single offense, one being a misdemeanor and the other being a felony and the Defendant therefore is entitled to be apprized of the offense with which he is charged in order that he may properly defend this cause. Therefore, if Art. 725(b), V.A.P.C. does in fact prohibit the possession or sale of paregoric, to that extent the act is void and the indictment drawn pursuant thereto should be dismissed. (Paragraph XIV) (R. p. 8)

"The Defendant objects and excepts to the indictment and moves the Court to dismiss the indictment for the reason that if the indictment is drawn pursuant to the prohibitions of Art. 725(b) V.A.P.C., then the statute is void to the extent that it attempts to control paregoric as Art. 725(b), V.A.P.C. incor-

porates by reference the Federal Narcotic Law and there is a basic difference in the definition of narcotic drugs as enumerated in Art. 725(b) and the Federal Narcotic Laws therefore, as to paregoric to the extent that paregoric is attempted to be controlled by Art. 725(b), V.A.P.C., it is void." (Paragraph XV). (R. p. 9)

During the trial of this case, Appellant's counsel made the following objections that are pertinent to the controversy. In questioning Appellant's father, a licensed and registered pharmacist:

"Q. Mr. Kirkland, can you tell me whether or not there is less than four grains of opium per ounce in paregoric?
A. Yes, sir.
MR. DUNN: We object as immaterial.
THE COURT: Sustained.
MR. WOODY: Note my exception." (R.p. 99)
Q. Is there less or more than four grains of opium per fluid ounce? (of paregoric)
A. It is less." (R. p. 100)

And again:

"Q. Approximately how much paregoric would one have to purchase, if you know, to have one-half grain of morphine—
MR. DUNN: I object. The witness isn't qualified.
THE COURT: Sustained.
MR. WOODY: Note my exception, I asked him if he knew." (R. p. 108)

After the State rested, Appellant's counsel moved as follows:

> "MR. WOODY: We further move the Court to instruct the jury to find the defendant not guilty for the reason that it had been established that the defendant is the owner of an apothecary, and our statutes which cover apothecaries and selling by apothecaries renders the owner not liable for the sale of exempt narcotics, and by the State's own testimony they have proved this to be an exempt narcotic." (R. p. 82)

In Appellant's Amended Motion for New Trial, duly presented to the trial court, Appellant again pointed out to the trial court "That the indictment does not allege an offense against the laws of the State of Texas." (R. p.24)

(B) In The Court of Criminal Appeals of The State of Texas

The Appellant in his original brief in the Court of Criminal Appeals of Texas urged as his first point of error that:

> "The State wholly failed to make a prima facie case of the illegal sale of a narcotic drug." (R. p. 136)

In his argument under this point, Appellant urged that:

> "The sale and distribution of narcotic drugs is controlled in Texas by the Uniform Narcotic Drug Act, Art. 725 V.A.P.C., which incorporates by reference the Federal Narcotic Laws, including Title 26, U.S.C. §4702." (R. p. 136)

Appellant urged that the Federal law, to-wit: 26 U.S.C.A. §4702 exempted from its regulatory provisions preparations containing not more than one-fourth (1/4) grain of morphine per fluid ounce.

Appellant in his Motion for Rehearing reurged this point to the Court below with no success. In his Second Motion for Rehearing, appellant stated:

> "This Honorable Court has not passed on the interpretation of paregoric as that compound is interpreted by the Harrison Act. The Harrison Act does exempt from the provisions thereof the possession of paregoric. This Honorable Court has interpreted the Harrison Act, to-wit: Title 26 U.S.C.A. in a manner inconsistent with the interpretation of the Act by the federal appellate court; therefore, there is a conflict between the laws of the State of Texas as interpreted by the highest Court of the State of Texas and the decisions from the appellate federal courts on the same federal statute." (R. p. 174)

The Court of Criminal Appeals of Texas treated Appellant's reliance upon 26 U.S.C.A. §4702 in a cursory manner:

> "Appellant's next contention is that 26 U.S.C.A. §4702, is incorporated into Texas law. In light of the 1960 amendment (apparently overlooked by him) of that article, we fail to see how it could benefit his case. The record does not reveal how the federal exemptions are to apply." Original Opinion-Appendix A, also (R. p. 161).

SUBSTANTIALITY OF THE QUESTION PRESENTED

I.

The question presented on appeal is substantial from a federal point of view because of its close connection with a series of treaties and international agreements duly en-

tered into by the United States and many foreign countries. These treaties are, by virtue of Article 6, Clause 2 of the Constitution of the United States, the supreme law of the land as is the Constitution and laws of the United States made pursuant thereto. As the Supreme Law, ". . . the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Constitution of the United States, Article 6, Clause 2; therefore, the allegation herein that the law of a state runs contrary to a treaty of the United States is substantial.

The treaty in question and its subsequent amendments, were agreements between the United States of America and other nations in which the parties sought to effectuate an effective means for controlling the narcotic drug problem which had plagued the signing parties for a period of decades.

> "Your committee's bill, H.R. 529, is designed to give full effect to treaty obligations of the United States to limit exclusively to medical and scientific purposes the manufacture of narcotic drugs. . . It is also designed to amend the Narcotic Drug Import and Export Act (21 U.S.C. 171-185) to bring the regulations of exports in conformity with current treaty obligations. . ."
>
> "Thus the United States Government is obligated by treaty . . . to enact laws to limit production and sale to medical and scientific purposes, to furnish an annual estimate of its needs for such purposes, and to restrict the quantity manufactured to the amount of the estimate." 2 U. S. Cong. & Adm. News '60, pp. 1876, 1880. (Senate Report)

The United States, in entering into these agreements was exercising its powers under the Constitution of the United States and in enacting laws, 26 U.S.C.A. §§4701 and 4702 and the regulations thereunder, 26 C.F.R. 151.428 at page 282, has exercised its Constitutional power, Article 1, §8, to regulate commerce with foreign nations, punish offenses against the Law of nations and to make all laws necessary to effectuate the purpose of the aforesaid treaty. Any such laws supersede conflicting state laws. *Knapp v. Schweitzer*, 357 U.S. at 375, 2 L.Ed. 2d at 1398. The only requirement is that the power exercised by the Federal Government (here 26 U.S.C. §§4701, 4702) to the deletion of the State power is necessary to effectuate the exercise of the Constitutionally granted power (here Article 1, Sec. 8). *Reina v. United States*, 364 U.S. at 511, 5 L.Ed. 2d at 254.

In the *Reina* case, supra, this Honorable Court in construing a part of the Narcotic Control Act of 1956, (18 U.S.C. §1406) stated:

> ". . . The Congress has evinced serious and continuing concern over the alarming proportions to which the illicit narcotics traffic has grown. *The traffic has far-reaching national and international roots.* See S. Rep. No. 1997, 84th Cong. 2d Sess., pp. 3-6. The discovery and apprehension of those engaged in it present particularly difficult problems of law enforcement. The whole array of aids adopted in 1956, of which immunity is but one, was especially designed to 'permit enforcement officers to operate more effectively.' HR Rep. No. 2388, 84th Cong. 2d Sess., p. 10. The grant of both federal and state immunity is appropriate and conducive to that end, and that is enough. Even if the grant of immunity were viewed as not absolutely

necessary to the execution of the congressional design, '[T]o undertake here to inquire into the degree of . . . necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.' M'Culloch v. Maryland (US) 4 Wheat 316, 423, 4 L.Ed 579, 605. *And the supersession of state prosecution is not the less valid because the States have traditionally regulated the traffic in narcotics, although that fact has troubled one court.* See Tedesco v. United States (CA 6 Mich) 255 F. 2d 35. Madison said, 'Interference with the power of the States was no constitutional criterion of the power of Congress. *If the power was not given, Congress could not exercise it; although it should interfere with the laws, or even the Constitution of the States.*' II Annals of Cong. 1897 (1791). Or as the Court has said concerning federal immunity statutes, '. . . since Congress in the legitimate exercise of its powers enacts 'the supreme Law of the Land,' state courts are bound by [§ 1406], even though it affects their rules of practice.' Adams v. Maryland, supra (347 US p. 183)." (Emphasis added) 364 U.S. at 512, 5 L.ed 2d at 254.

Congress has recognized the narcotics problem as being international in scope; its enactments must of necessity be given the broadest possible Constitutional import. A thorough examination of 18 U.S.C. §§ 4701, 4702 and the regulations thereunder leads to only one conclusion: This is the supreme Law of the Land by which all states are bound.

This is not comparable to the situation with which this Court dealt in *California v. Zook*, 336 U.S. 725, 93 L.ed 1005. In that case this Honorable Court held that a state law was not invalid merely because it prescribed a more

serious penalty than did the federal law; here, the state is punishing for an offense which under federal law, which is the effectuation of treaties, *is not an offense at all.*

Appellant contends that a citizen of a country that signed the treaties in question would not be under any liability for the same state crime as the state contends Appellant is. It seems grossly unfair to punish Appellant because he is a citizen of the United States and a resident of Texas.

ALTERNATIVE PETITION FOR CERTIORARI

If this Honorable Court is of the opinion that this cause should be reviewed by Petition for Writ of Certiorari rather than appeal, Appellant, in compliance with 28 U.S.C.A. § 2103, tenders the following two part question which he prays this Honorable Court to consider:

Have the rights of the Petitioner under the Fourteenth Amendment to the Constitution of the United States been violated where:

(a) The Petitioner has been convicted of a crime, following a prosecution in which he pled not guilty and the prosecution introduced no constitutionally acceptable evidence of the Petitioner's guilt?

(b) A state has, through legislation and interpretation of legislation made it impossible for one at the time of acting to know the specific nature and consequences of his act?

(a) Appellant-Petitioner, hereinafter referred to as Petitioner was convicted of the state penal offense of unlawful

sale of narcotic drugs, to-wit: the sale of twenty (20) ounces of a medicinal solution containing not more than .17798 grains of morphine per fluid ounce. Petitioner is the owner of an apothecary duly licensed under the Federal Narcotic Control Act, The Harrison Act. (R. pg. 88)

As has been enumerated more fully, supra, the federal law, pursuant to the effectuation of several treaties and international agreements has exempted from its control, medicinal solutions containing less than .2500 (1/4) grains of morphine per fluid ounce. 26 U.S.C.A. §§ 4701, 4702; 26 C.F.R. 151.428. It is Petitioner's position that the federal law herein, because of the constitutional position of treaties and the constitutional power of laws enacted in furtherance of treaties, is controlling over the state law where there is a major discrepancy as here. This position is given added weight when the provisions of the state law, to-wit: Art. 725b, § 1, (14), (15) and § 2(a) are considered. The state by these provisions has specifically included within its act the terms of the Federal Narcotic Laws, apparently in the recognition that the two bodies of law must coincide, to the hazard of the state law.

The Court of Criminal Appeals of Texas has in interpreting these provisions, failed to recognize 26 C.F.R. 151. 428 and in so doing has in fact construed the Federal Narcotic Law as including under its control medicinal solutions containing less than .2500 (1/4) grains of morphine per fluid ounce. This interpretation runs directly contrary to the plain wording of the federal statute.

By so acting, Petitioner contends that the Court of Criminal Appeals of Texas and the State of Texas have deprived him of due process of law and equal protection

of the law as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States. No evidence to convict him of any offense, permissible by the terms of the Constitution of the United States, has been introduced by the State of Texas. The State rather, showed that in fact the Petitioner was engaged in the sale of a medicinal solution not controlled by law. To allow such a conviction to stand would be contrary to the holding of this Honorable Court in *Taylor v. Louisiana*, 370 U.S. 154, 8 L.ed 2d 395, 82 S.Ct. 1188 and *Garner v. Louisiana*, 368 U.S. 157, 7 L.ed 2d 207, 82 S.Ct. 248.

(b) Petitioner further contends that he has been deprived of due process of law and equal protection of the law by the State of Texas in that the Court of Criminal Appeals of Texas has held that Art. 725 (b) V.A.P.C. and not Art. 758, V.A.P.C. is the controlling statute, even though, under the circumstances of this case, Art. 758 V.A.P.C. is the more specific of the two statutes and one is a misdemeanor and the other a felony offense.

It is clearly evident that some of the acts within the purview of Art 725b V.A.P.C. are also within the purview of Art. 758 V.A.P.C. Article 758, Vernon's Annotated Penal Code of Texas, however, is the more specific of the two statutes in this instance due to the fact that the petitioner herein, by uncontradicted testimony was shown to be the owner of an apothecary and not a licensed pharmacist.

To allow a conviction to stand in the instant case would be to allow the state to provide for two separate offenses for the same act. Such a situation allows unlimited discretion on the part of prosecuting officials to charge either

a felony or a misdemeanor. Such a chaos deprives one of his constitutionally protected right to know the nature and consequences of an act he commits before the commission of the act. Constitution of the United States, Amendments Five and Fourteen. See also *Daloria v. Rhay*, 252 F. 2d 768 at 770.

CONCLUSION

Appellant respectfully suggests that this appeal brings before this Honorable Court a federal question under the Constitution and laws of the United States which is substantial, far-reaching and deserving of plenary consideration by this Court with briefs on the merits and oral arguments for its resolution; and that if this Court is of the opinion that the problem herein involved should be heard by way of Petition for Writ of Certiorari, this Honorable Court should issue the Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas and set aside the holding of the Court of Criminal Appeals of Texas in Cause Number 35,153.

Respectfully submitted,

CLYDE W. WOODY
Attorney for Appellant
1114 Texas Avenue Building
Houston 2, Texas
CA 2-9225

CERTIFICATE OF PROOF OF SERVICE

I, Clyde W. Woody, the undersigned attorney, for Appellant in the above styled cause, hereby certify that on this the ____ day of August, A.D. 1963, I served a copy of the above Jurisdictional Statement and alternate Petition for Certiorari upon the Honorable Waggoner Carr, Attorney General for the State of Texas, by depositing an envelope containing such copy in the United States mail at a United States Post Office in Houston, Harris County, Texas, with sufficient first-class - certified mail - postage prepaid and affixed thereto, addressed to him at his office in the State Capitol Building, at Capitol Station, Austin, Texas.

CYLDE W. WOODY

APPENDIX A

No. 35,153

CLEVELAND KIRKLAND, *Appellant*

v.

Appeal From Harris County

THE STATE OF TEXAS, *Appellee*

OPINION

The offense is the unlawful sale of a narcotic drug; the punishment, five years in the penitentiary.

The state's evidence reflects that appellant was the owner of a drugstore in Houston and that, in one transaction, he sold to Officer Pollock, an undercover agent of the Houston police department, from the back door of his establishment, five four-ounce bottles of paregoric. There was no prescription for the preparation, and the officer was not required to sign any register. The bottles were unlabeled.

Appellant took the stand and denied the entire transaction.

The first proposition to be considered is appellant's contention that there is a variance between the pleadings in the indictment and the proof. The indictment charged the unlawful sale of a narcotic drug, "to-wit, a preparation of opium commonly known as paregoric."

Appellant asserts that the proof shows that the narcotic content of paregoric is morphine, not opium, and thus

that there is a fatal variance. Without extensive reference to the testimony, suffice it to say that there was evidence that paregoric was a preparation of "opium," or "morphine," and was "an opiate."

Assuming, without conceding, appellant's assertion to be correct that morphine is the narcotic ingredient of paregoric, we still must reject his contention. Art. 725b, Sec. 1(12), V.A.P.C., defines opium as including *"morphine*, codein, and heroin, *and any compound*, manufacture, salt, *derivative, mixture, or preparation of opium*, but does not include apomorphine, or any of its salts." (Emphasis added)

Thus, while the proof may have shown the paregoric to have contained morphine, this is not a variance from the allegation of a "preparation of opium," Sec. 1(12) 725b, and the necessity for specifically informing the accused of the nature of the accusation, as set out in *Baker v. State*, 58 S.W. 2d 535, is adequately met by the phrase, "commonly known as paregoric." See: *Criswell v. State*, 346 S.W. 2d 341.

Appellant next contends that the indictment fails to charge him with an offense, because paregoric is an exempt drug. In support of this proposition he cites Sec. 9(1) of Art. 725b. V.A.P.C., and 26 U.S.C.A., Sec. 4702.

Sec. 9(1) contains the following proviso:

> "Provided further, that any person may purchase at any time one (1) ounce of paregoric without a doctor's prescription."

The answer to this contention lies in the section of our statute relied upon. When the legislature specifically names one commodity and prescribes rules for its dispensing, then

the remainder of the statute may be disregarded because the legislature has made its intention clear as to the named commodity.

The failure to allege that appellant sold more than one ounce is not fatal. Such is a defensive matter and is not required to be alleged. Browning v. State, 276 S.W. 2d 552. Nor is it required that the exceptions provided by the statute be negatived. Sec. 21, Art. 725b. V.A.P.C.; Torres v. State, 278 S.W. 2d 853; Manson v. State, 316 S.W. 2d 414; Bridges v. State, 316 S.W. 2d 757.

Appellant's next contention is that 26 U.S.C.A., Sec. 4702, is incorporated into Texas law. In light of the 1960 amendment (apparently overlooked by him) of that article, we fail to see how it could benefit his case. The record does not reveal how the federal exemptions are to apply.

If it is appellant's contention that paregoric is an "opiate" within the provisions of Sec. 1(14), 725b, we point out that such provision clearly refers to the more restricted definition of "opiate" found in Webster's Third New International Dictionary (G. & C. Merriam Co., Springfield, Mass., 1961):

> ". . . 2: *a synthetic drug* capable of producing or sustaining addiction *similar to that characteristic of morphine and cocaine*: Narcotic—used esp. in modern law . . ." (Emphasis added.)

See: Commissioner's Comment, Uniform Narcotics Act., Sec. 1, 9B ULA, p. 282, 26 U.S.C.A., Sec. 4731 (g).

Thus the word "opiate," as used in the statute, is not meant to apply to preparations "containing or mixed or impregnated with opium," Webster's Third New Inter-

national Dictionary, supra, but to synthetic preparations having characteristics similar to those of morphine or cocaine.

Appellant next contends that the evidence is not sufficient to support the conviction.

Sec. 2(a), 725b, V.A.P.C., makes it unlawful for a person to sell or dispense any narcotic drug; Sec. 2A adds that it shall be lawful where so authorized by the terms of the act. Sec. 6(1) allows an apothecary "in good faith" to "sell and dispense narcotic drugs to any person upon written prescription, or an oral prescription. . ."

The evidence clearly shows a sale by the appellant of more than one ounce of paregoric to Officer Pollock, without a prescription.

The appellant insists that the court erred in not instructing the jury on the penalty for "dispensing any drug at retail," under Art. 758, V.A.P.C. However, he fails to recognize that "a person may be held to answer for any offense, great or small, which can be legally carved out of the transaction." 16 Tex. Jur. 2d, Criminal Law, Sec. 24; 1 Branch's Ann. P. C. 2d Ed. 625, Sec. 654; Lewis v. State, 346 S.W. 2d 608.

Appellant's contentions are without merit.

Finding the evidence sufficient and no reversible error appearing, the judgment is affirmed.

McDONALD, Judge

(Delivered February 6, 1963)

No. 35,175

CLEVELAND KIRKLAND, *Appellant*

v.

Appeal From Harris County

THE STATE OF TEXAS, *Appellee*

OPINION
ON MOTION FOR REHEARING

Appellant states that we did not, in the light of what we said in Venzor v. State, 283 S.W. 2d 397, properly dispose of his objection to the failure of the court to give the jury in his charge an opportunity to find appellant guilty of a violation of Article 758, V.A.P.C. In Venzor, we said:

> "Appellant was admittedly a practicing physician, licensed as such by the Board of Medical Examiners of this State. He was therefore admittedly a practitioner, as that term is used in the statute. Yet the jury was not so instructed, nor was the term practitioner defined in the charge."

The effect of the above statement was that Venzor being a licensed physician was entitled to the affirmative defense which was specifically enumerated in Article 726c, V.A.P.C., relating to the dispensing of barbiturates (but which has since been repealed), and such defense should have been submitted to the jury. However, in the case at bar, no affirmative defense is presented, and appellant is not entitled to a charge under Article 758, supra, because he was charged with selling a narcotic drug under Article

725b, V.A.P.C., and not a barbiturate under Article 726d, V.A.P.C. (dangerous drugs). The provisions of Article 758 do not apply to narcotics but do apply, among other things, to dangerous drugs.

Remaining convinced that we properly disposed of this cause originally, appellant's motion for rehearing is overruled.

Morrison, Judge

(Delivered March 27, 1963)

CLERK'S OFFICE COURT
OF CRIMINAL APPEALS
Austin, Texas

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, at Austin, do hereby certify, in Cause No. 35,153

CLEVELAND KIRKLAND, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

that Appellant's Second Motion for rehearing was overruled without written opinion on April 24, 1963.

WITNESS my hand and seal of said Court, This 29th day of July, A.D. 1963.

GLENN HAYNES
Glenn Haynes, Clerk
Court of Criminal Appeals of Texas